TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1926

No. [redacted] 202

ROBERT L. MESSEL, PETITIONER,

vs.

FOUNDATION COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

PETITION FOR CERTIORARI FILED AUGUST 22, 1925

CERTIORARI GRANTED OCTOBER 19, 1925

(31,417)

(31,417)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 694

ROBERT L. MESSEL, PETITIONER,

vs.

FOUNDATION COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 2, 1925

No. 27169.

SUPREME COURT OF LOUISIANA.

ROBERT L. MESSEL,

versus

FOUNDATION COMPANY.

The petition of Robert L. Messel, of full age of majority and domiciled in the City of New Orleans, plaintiff in the cause entitled Robert L. Messel vs. Foundation Company, lately pending in the Court of Appeal for the Parish of Orleans, State of Louisiana, with respect, represents:

I.

That in the said matter entitled Robert L. Messel vs. Foundation Company, No. 8831 of the docket of the Court of Appeal for the Parish of Orleans, the Honorable the Court of Appeal did on the 2nd day of February, 1925, render an opinion and decree wherein a judgment of the Civil District Court rendered in favor of the said Foundation Company, defendant, was affirmed, as will appear by reference to the copy of said opinion and decree of the said Court of Appeal annexed hereto as part hereof.

II.

That your petitioner did apply for a rehearing from said opinion and decree within the time prescribed by law and rules of the said Court of Appeal which rehearing was refused on the 2nd day of March, 1925, as will appear by reference to the copy of the petition for a rehearing and a certificate of the Clerk of the Court of Appeal showing that the rehearing was refused, without reasons being assigned.

III.

That petitioner filed in the Clerk's office of the Court of Appeal a notice addressed to the parties to the suit, of his intention to make application to this Court for Writs of Certiorari and Review, as will appear by reference to a copy of said notice annexed hereto and made part hereof.

IV.

Your petitioner further shows that the said suit entitled Robert L. Messel vs. Foundation Company is an action IN PERSONAM for personal injury, growing out of his employment in a maritime contract, the work itself being in its nature maritime, and the injury received being also maritime. The plaintiff basing his right of action on the clause in the Judiciary Code, saving to suitors, "In all cases the right of a common law remedy where the common law is competent to give it." The common law remedy being codified and set forth in the language of Art. 2315, C. C.: "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." Plaintiff specially pleads his right to proceed in an action IN PERSONAM under said Art. 2315, C. C.

The defendant filed an exception of no right or cause of action and coupled with it as a part of the same document an answer wherein it set out in detail its contention that the plaintiff had no right or cause of action under Art. 2315 of the C. C., and averred that plaintiff's right if any was to be found in the provisions of Act No. 20 of 1914, as amended by Act No. 38 of 1918, and further denied that it was in any way at fault or liable to plaintiff. Such are the issues joined by the petition and answer.

Before the case was set for trial plaintiff, by supplemental petition prayed in the alternative for the compensation provided by Act No. 20 of 1914, as amended by Act No. 38 of 1918.

The defendant then reiterated as an exception its original denial that plaintiff had no right or cause of action and pleaded also the prescription of one year under the Act No. 20 of 1914 in bar of the supplemental and alternative plea.

V.

The Court fixed the exceptions for hearing and on the trial of the exceptions the District Court maintained all of the exceptions, i. e., the exception of no right or cause of action, and the exception or plea of prescription of one year, and accordingly dismissed plaintiff's suit.

VI.

Petitioner shows that the Honorable Court of Appeal erred in its judgment; (a) in holding that it had no jurisdiction ratione materiae of the subject matter in

dispute, under the provisions of Art. 2315 of the C. C. even though the action was brought in a suit IN PERSONAM; (b) in holding and maintaining that the clause in the Judiciary Act saving to suitors,

> "In all cases the right of a common law remedy, where the common law is competent to give it,"

refers to remedies for enforcement of the Federal maritime law, and does not create substantive rights or assent to their creation by the States; (c) and in its conclusion that an employee who suffers injury upon a vessel while engaged in a maritime contract cannot seek damages in a State Court under any circumstances.

VII.

Petitioner shows that the questions which your Honors must decide so as to create a uniform jurisprudence is whether or not a State Court has jurisdiction ratione materiae to hear and determine a proceeding IN PERSONAM based on a tort action growing out of a maritime contract, and whether or not an employee who is injured while engaged in work of a maritime nature and growing out of a maritime contract, can elect to proceed in the State Court in a proceeding IN PERSONAM under the saving clause of the Judiciary Act, which reserves to the litigant, "The right of a common law remedy where the common law is competent to give it"; and whether or not a common law remedy is embodied in the provisions of Art. 2315 of the C. C., "Every act whatever of man that causes damage to another obliges him by whose fault it happen to repair it."

VIII.

Your petitioner shows that these questions are solely questions of law and that they have been decided in the affirmative by this Court in a number of well considered decisions. In the case of Southern Drydock Company vs. Steamboat Perry, 23 La. Ann. 39, the Court held that in a case where the master has been cited personally and is sought to be made liable in his individual capacity, the State Courts, while they are without jurisdiction to proceed IN REM, have jurisdiction of the personal action. And in the case of Switzer vs. Heinn 27 La. Ann. 25, which was a proceeding IN PERSONAM against the owners of a steamboat, to enforce a claim against the vessel, the Court held that it was not a proceeding IN REM to enforce a maritime lien and that therefore there was no force to the objection that the State Court was without jurisdiction. And in the recent case of Gray vs. New Orleans Drydock Shipbuilding Company, 146 La. 826, which was an action for personal injury growing out of a maritime contract and was a proceeding IN PERSONAM against the defendant this Court decided that the State Court had jurisdiction of such a suit and that the common law remedy reserved to the litigant in the saving clause of the Judiciary Act was codified and embodied in the provisions of Art. 2315 of the C. C. These decisions of our State Court have been ratified and embodied in a number of well reasoned cases decided by the United States Supreme Court which will be set out in detail in briefs to be filed herein. That for the foregoing reasons and in the interest of making uniform jurisprudence for the State of Louisiana, and that since this application is based

solely upon the ground that the decision on the question of law involved is in conflict with the established jurisprudence of this Court as set forth herein, your petitioner is entitled to have this Honorable Court review the pleadings and the law, and pronounce final judgment of the issues thus raised, that petitioner in support of this application will file briefs herein.

WHEREFORE, the premises considered, petitioner prays that a writ of certiorari issue herein, commanding the Honorable Court of Appeal for the Parish of Orleans to send up to this Court the record hereinabove mentioned so that same may be reviewed, and that this Honorable Court may pronounce final judgment herein, and that the errors committed by the said Honorable Court of Appeal be corrected and that there be judgment reversing said opinion and decree of the Court of Appeal, and that the said cause be reinstated and remanded to the District Court to be there proceeded with according to law. And your petitioner prays for general relief and costs.

(Signed) Chas. I. Denechaud,
(Signed) J. F. Pierson,
(Signed) Claude L. Johnson,
Attorneys for Petitioner.

AFFIDAVIT.

Before me, the undersigned authority, personally came and appeared Robert L. Messel, who, being duly sworn deposes and says:

That he is the plaintiff herein, and that he has read the above and foregoing petition, and that all the facts

and allegations contained in the said petition are true and correct.

(Signed) Robert Leon Messel.

Sworn to and subscribed before me this 16th day of March, 1925.

(Signed) Chas. I. Denechaud,
Notary Public.

(Seal)

No. 134692.

CIVIL DISTRICT COURT,
DIVISION "A".

ROBERT L. MESSEL

versus

THE FOUNDATION COMPANY.

PETITION

To the Honorable the Civil District Court for the Parish of Orleans, State of Louisiana:

The petition of Robert L. Messel of the said Parish of Orleans, Louisiana, respectfully represents:

I.

That the "Foundation Company" a corporation organized in and under the laws of the State of New

York, located in said Parish of Orleans, State of Louisiana, and therein pursuing with its dry docks, repair plants in said Parish, its business of ship builders, repairers and equipers of sea-going steamships and vessels in said Parish of Orleans, is justly and truly indebted to your petitioner in the just and full sum of Ten Thousand Dollars ($10,000.00) with 5% per annum interest thereon from July 9th, 1920 until paid, for this, to-wit:

II.

That said defendant the Foundation Company in September, 1919, employed your petitioner as "helper" to the "boilermaker" to work on its ship building plants, docks and repair plants in this city at a wage of 64c per hour on the basis of 40-48 hours per week, which employment continued until July 9th, 1920.

III.

That on July 9th, 1920, your petitioner as helper, was sent with the boilermaker on board the Steamship "LaGrange" then lying afloat on the Mississippi River opposite Desire Street in this City of New Orleans to add an elevation of eight feet on the top of the smokestack of said steamship.

IV.

That they were furnished two ladders on which to ascend from the upper deck of said steamship some fifteen feet to the top of said smokestack, the added elevation requiring the co-operation of two workmen to place and secure said addition on the top of said smokestack, one on each side thereof.

V.

That there was a steam escape pipe running from the engine room in the lower deck of the steamship up and attached to said smokestack to within two feet of the top of the smokestack.

VI.

That in adjusting and securing said addition on the top of said smokestack petitioner on one side and the boilermaker on the other side, petitioner was brought directly over the top of said escape pipe, and to properly fit on and secure said addition and whilst he was so engaged, steam from the boiler-room below was turned through said escape pipe, directly escaping on petitioner at his work the said steam being at a high grade of scalding heat.

VII.

The escaping steam instantly overcame petitioner, and by the force of it, he was hurled from his perch and thrown some fifteen feet to the upper deck below where he lay prostrate, unable to help himself.

VIII.

That others seeing his distressed predicament cut or tore his scalding clothes from him, he being unconscious the while. After affording such temporary relief as was available he was sent to the Charity Hospital in this city where he was held some three weeks under treatment, after which he was sent to his home in this city where he has remained a helpless invalid to the present time.

IX.

That he was frightfully and deeply burned from the scalding steam, on his right side, on his hip and flank, on his side, arm-pit and arm, whereby he has since been unable without great pain to use his right side limbs and has since remained a helpless invalid.

X.

That he has since his discharge from the hospital sought medical and surgical aid without relief; that his condition has been examined by doctors and surgeons, and whilst they hold out to him a hope of ultimate relief and restoration to some extent, he has so far experienced no substantial relief.

XI.

Petitioner represents that the said casualties and injuries inflicted on him aforesaid were due to the gross and reckless fault and neglect of said defendant, its managers, agents, representatives and employees in sending petitioner aloft to do the work on said smoke-stack without securing him against turning the steam on him through said pipe whilst he was engaged in the work aforesaid. That it was reckless, inhuman and intolerable for said defendant, its managers, vice-principals, managers, agents or employees to send him to do said work without absolute security against said steam whilst so engaged, the failure to render him secure against such casualty, involving the taking of his life, is beyond excuse on any ground.

XII.

That from said casualty your petitioner suffered the tortures of the inferno, of excruciating and agonizing pains of the scalding steam, the most dreadful form of burning and the excruciating tortures of the hour of his injuries can not be surpassed by a living victim.

XIII.

Petitioner, a young man at the threshold of manhood, inspired by the aspirations and ambitions of ardent youth to earn and gain promotion in his chosen industrial pursuit, and ultimately win distinction in his career, has by said casualty had all his hopes and ambitions thwarted, and he has been compelled to submit to the hopeless life of an invalid, and all these and other damages he has suffered by the cruel neglect and want of care of his employers to protect him whilst engaged in his work for them.

XIV.

Petitioner represents that he is entitled to claim and recover under Civil Code Article 2315 of this State all the damages sustained by him arising from the casualties aforesaid, and to have the amount of the reparations fixed and determined before the Court after due trial and hearing had, and as provided by Article 6 of the Constitution of 1913 of this State; and not by the amount of sums provided for by Act No. 20 of 1914, this State, nor as amended by Act 243 of 1916, nor Act No. 38 of 1918, nor Acts Nos. 244 and 247 of 1920 of this State.

XV.

That insofar as the said Act No. 20 of 1914, or the aforesaid Acts amendatory thereof, do or attempt to adjudge or fix the amount of damages or reparation due or recoverable by petitioner for the casualties or damages inflicted as aforesaid on him, to control the amount petitioner may or shall recover the said Act and the said Acts amendatory thereof are usurpations of the judicial powers and functions conferred upon the Courts of this State, as provided by Article 6 of the Constitution of 1913, which provides, that "every person for injury done him in his person * * * shall have adequate remedy by due process of law and justice administered without denial", etc. That under said Article it is the duty and function of the Court to assess and adjudge, after due hearing of all the facts, conditions and circumstances of each separate case the amount of the reparation the injured person is entitled to, and this by the Article constitutes the peculiar and principal function conferred on the Court, which is the very object sought by the process and by the trial.

XVI.

That by Article 16 the said Constitution divides the exercise of the powers of the State government into three separate departments: the legislative into one; the executive in another and the judicial department into a third. And by Article 17 it provides that no one of them, or person holding office in one of them shall exercise power properly belonging to either of the others. The said Act No. 20 of 1914 and the said Acts amendatory thereof do trench upon and usurp the judi-

cial remedy conferred upon the injured person by Article 6 of said Constitution, insofar as said Acts purport or attempt to adjudge or fix the amount of the reparation or compensation the Court shall award the injured person, after a contradictory hearing from the parties; and said Acts to that extent at the least, are in contravention of and violate all the prohibitions of Article 17 of said Constitution.

XVII.

That the adequate remedy given by the Article 6 of said Constitution is a vested right, privilege and immunity in favor of the injured person, which said Act No. 20 and the said Acts amendatory thereof impair and take away without process of law and in violation of Article 17 of the said Constitution of this State, and as such same is in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States which provides that "no State shall make or enforce any law which shall * * * deny to any person within its jurisdiction the equal protection of the law."

The said Act No. 20 of 1914 and said amending Acts thereof of said State do deny to petitioner and the other employees specified, the benefit and protection of the vested right to the adequate remedy provided by Article 6 of the Constitution of said State and they deny to petitioner and other employees equal protection in common with other persons non-employees, for like personal injuries inflicted, by attempting to debar petitioner and other employees from the remedy provided by Article 2315 of the Civil Code of this State,

vouchsafed to by the said Articles 6 of the Constitution of this State.

XVIII.

Petitioner represents that he is a native born citizen of the United States and of this State of Louisiana, that when injured as aforesaid he was engaged in marine work in admiralty on the said Steamship La Grange on the navigable waters of the United States, said steamship being engaged in sea navigaton between this port of New Orleans and other seaports, foreign and domestic, and that said injuries on board the said steamship, repairing her smokestack in this port of New Orleans entitled him to the action in rem in admiralty against said vessel or the action IN PERSONAM against the owner and master of said vessel, but said owner and master had departed from this port for a foreign port before petitioner was able to bring his action in admiralty and he was thereby deprived of said action in admiralty. That his legal right to adequate relief for said injuries is the same in this case as it would have been in admiralty in rem against said vessel or IN PERSONAM against said master or owner, as to which parties and actions the said Act No. 20 and the Acts amendatory thereof have no application and hence same are without application in this action, the cause being the same.

XIX.

Petitioner on information represents that the said defendant the Foundation Company herein holds indemnity by the ( ) Company against any loss to it on account of the damages herein

claimed, but that the amount of said damages only affects or concerns said indemnitors as to whom said Act No. 20 and said amendments have no application as to the amount of said damages to be awarded herein, the said defendant employer hired herein has no real or actual interest or concern.

XX.

That your petitioner through his counsel gave notice, long prior to filing this petition to said defendant, his said employer, of the said injuries inflicted on him as aforesaid and made amicable demand for said damages without avail.

WHEREFORE, the premises considered, petitioner prays for due notice, citation and service on said defendant through its proper officer and representative, and after final trial and hearing contradictorily had, petitioner prays that the said Act of the Legislature of this State No. 20 of the session 1914 and said Acts No. 243 of 1916; 38 of 1918 and No. 245 of 1920, insofar as said Acts or any of them infringe or abridge the adequate remedy provided by Article 6 of the Constitution of this State be adjudged and declared unconstitutional and null, void without effect against the claim of petitioner herein, and in violation of Article 17 of said Constitution as an usurpation of the judicial power of the Court conferred by said Article 6, thereof, and furthermore that said Act and said amendments be decreed and declared to deprive petitioner of the equal protection of the adequate remedy provided by said Article 6 of the Constitution and to deprive him of the equal protection of the law of the land equally

with all other persons injured as provided for, and to be in violation of said Fourteenth Amendment of the Constitution of the United States and decree to be null and void and without effect as against this petitioner and his said claim and petitioner further prays for judgment againt said defendant the said Foundation Company for the said sum of Ten Thousand Dollars ($10,000.00) with 5% per annum interest thereon from July 9th, 1920 until paid in reparation of the damages the losses sustained and advantages and profits lost by him from the injuries aforesaid, and for such relief as by law or equity petitioner is entitled to demand and recover, and for all costs and general relief.

(Signed) Charles I. Denechaud.

Robert Leon Messel plaintiff being duly sworn, deposes and says that all the facts stated as of his knowledge in the foregoing petition are true and correct and all those stated therein as on information he believes are true and correct.

(Signed) Robert L. Messel.

Sworn to and subscribed before me this 20th day of December 1920.

(Signed) Charles I. Denechaud,
Notary Public.

A true copy.

(Signed) H. J. Stansbury,
Deputy Clerk.

New Orleans, La., March 18th, 1925.

CIVIL DISTRICT COURT

No. 134692 DIVISION A

ROBERT LEON MESSEL

versus

THE FOUNDATION COMPANY.

EXCEPTION.

Now into Court comes the Foundation Company and excepts to the petition of the plaintiff, on the ground that same discloses no legal cause of action, for that plaintiff's action, if any, is under Act 20 of 1914 as amended by Act 38 of 1918, for a compensation, by which Act and its provisions he is bound. And, only in the event that this exception is overruled respondent says:

1.

Respondent admits that it is a corporation organized under the laws of the State of New York, domiciled in the Parish of Orleans, and admits the nature of its business as set out, but denies that it is liable to plaintiff in any sum whatsoever as claimed.

2-3-4-5.

Respondent admits that the plaintiff was employed as a helper to the boilermaker and was working aboard

the Steamship LaGrange, and on information and belief, admits that they procured two ladders to reach the top of a smokestack, an addition to which was being contemplated, and admits that there was a steam pipe alongside the smokestack.

6.

Respondent has no information as to the manner or just how the petitioner attempted to do the work for which he was engaged or employed hence denies the allegations contained in this article and calls for strict proof thereof, but the respondent avers that if the plaintiff places himself directly over the top of the steam pipe without taking the precaution to advise the engine room of his situation, and of the fact that he was doing work thereon which necessitated his being immediately over the steam pipe he was guilty of gross negligence, assumed the risk, and any injuries received by him were received by him from his own fault, carelessness and negligence and want of precaution, or were caused by the negligence of some fellow servant.

7-8.

Respondent avers that it has no information sufficient to confirm a belief as to the truth of the allegations contained in these articles and hence denies same.

9-10.

Respondent admits, on information and belief, that plaintiff was badly burned, but respondent avers on information and belief, that he was not burned as seriously as he represents in his petition or in these articles,

and that his condition is not hopeless, but that on the contrary within a reasonable time he will be fully restored to all of his powers. Respondent avers, on information and belief, that none of the muscles were injured or burned or involved in any of the scars and, furthermore, that the scars are not attached at all or firmly to the underlying structures.

11.

Respondent denies that the injuries received by the plaintiff were due to any negligence or fault on the part of the respondent, but avers that the same was due to his own gross negligence, carelessness and want of precaution entirely. That the petitioner knew his duties and his work thoroughly and the danger to which he was exposed was an open, obvious danger, the risk of which he assumed or, in the alternative, that if there was any negligence it was the negligence of a fellow servant for which respondent is not responsible.

12.

Respondent admits that the plaintiff suffered pain and was badly burned but avers that same was not as serious as the plaintiff has set out.

13.

Respondent admits that the plaintiff is a young man but denies the other facts set forth in this article.

14.

Respondent denies that the plaintiff has any right or cause of action under the Civil Code Article 2315

and avers that under Section 3 of Act 28 of 1918, amendatory to Act 20 of 1914, the contract of hire between your respondent and petitioner was a matter of fact and is made by the law subject to the provisions of said Act unless there be, as a part of said contract an express statement in writing in the contract itself, or by written notice by either party to the other, that the provisions of this Act other than Sections 4 and 5 are not intended to apply; said section stating "it shall be presumed that the parties have elected to be subject to the provisions of this Act and be bound thereby, unless such election be terminated as herein provided." Respondent further avers that it posted the notice required by said Act, and that said employee as well as all employees of respondent accepted and were bound by the provisions of said Act. Respondent avers further that the said plaintiff did not exercise the right of termination or waiver authorized by this Act, and did not terminate the operation of the provisions of said Act to himself thirty days prior to the accident in question, and hence said employee is bound by the provisions of said Act and is precluded from bringing his action under Article 2315 of the Civil Code, but must bring same for compensation under said Act.

15-16-17-18.

Respondent avers that there is no allegation of fact in these articles but same is merely a statement of the opinion of counsel as to the law, and that it is not called upon to make any denial thereof, but respondent denies that the Compensation Act of 1914, and amendatory Acts thereof are unconstitutional, but avers on the contrary that they are in full force and effect and the plaintiff is bound by them.

19.

Respondent denies the facts and conclusions of law stated in this article.

20.

Respondent admits plaintiff made demand for damages for injuries received, but denies that he gave the notice under the Compensation Act as required by law.

WHEREFORE, exceptor prays that the exception of no cause of action is maintained or, in the alternative, on the trial of this case plaintiff's suit be dismissed at his cost.

(Signed) P. M. Milner,
(Signed) Philip S. Gidiere,
Attorneys for Defendant.

STATE OF LOUISIANA,
PARISH OF ORLEANS.

P. M. Milner and Philip S. Gidiere, being duly sworn, depose and say that all the facts and allegations of the foregoing are true and correct.

(Signed) P. M. Milner.

Sworn to and subscribed before me this 31st day of January, 1921.

(Signed) James Doyle,
Deputy Clerk.

A true copy.
(Signed) H. J. Stansbury,
Deputy Clerk.
New Orleans, La., March 18, 1925.

CIVIL DISTRICT COURT

No. 134692 DIVISION "A"

ROBERT LEON MESSEL

versus

THE FOUNDATION COMPANY.

AMENDED PETITION.

Now comes the said Robert Leon Messel plaintiff herein,

And now reiterating and reaffirming all the facts and averments of his original petition and in the alternative that it should be held and maintained that the Act No. 20 of 1914 as amended by the Act No. 36 of 1918 is constitutional and valid and that same apply in this matter and fix the compensation of the plaintiff for the injuries sustained as claimed in the defendant's Exceptions and Answer, then and in that event and alternative this plaintiff prays for judgment against said defendant for the compensation fixed by said Act No. 20 of 1914 and the Acts amending same for the sum of Four Thousands Dollars $4,000.00 or Ten Dollars $10.00 per week for four hundred weeks, as provided by said Act and amendments thereto for the permanent injuries set forth in his original petition, with legal interest thereon from July 9th, 1920 until paid and for such compensation and relief as afforded by said Acts and Amendments, but other-

wise he prays as before by said original petition and for general relief.

(Signed) J. F. Pierson,
and Charles I. Denechand,
Attorneys for Plaintiff.

Let the amendment be filed.

(Signed) H. C. Cage,
Judge.

May 7th, 1922.
New Orleans, La., March 18th, 1925.
A true copy.
(Signed) H. J. Stansbury,
Deputy Clerk.

CIVIL DISTRICT COURT

No. 134692 DIVISION "A"

ROBERT LEON MESSEL

versus

THE FOUNDATION COMPANY.

SUPPLEMENTAL PETITION.

TO THE HONORABLE HUGH C. CAGE JUDGE PRESIDING.

The Supplemental and Amended Petition of Robert L. Messel, plaintiff in the above cause, with leave of

the Court adopting all the facts and allegations of his original Petition respectfully represents, that in the event and alternative that it should be determined that the said damages claimed by him in said cause are governed and controlled by the said Act No. 20 of 1914 and the subsequent amendments thereto, and that same is not unconstitutional and invalid, in such alternative, but not otherwise, said plaintiff is entitled to recover of and from the said defendant for the permanent injuries inflicted on him in his person under said Act and Amendments thereto, the reparation of Ten Dollars ($10.00) per week for four hundred weeks amounting to the sum of Four Thousand Dollars ($4,000.00) with 5% per annum interest from July 20th, 1920 on date of said injuries inflicted on him.

WHEREFORE, reserving all averments and prayers of his original Petition, and without waiving the same, petitioner in said alternative, prays for judgment against said defendant for said sum of Four Thousand Dollars ($4,000.00) with 5% per annum interest thereon from July 20th, 1920 until paid and costs and general relief.

(Signed) J. F. Pierson,

Charles I. Denechaud.

ORDER.

Let this Supplemental and Amended Petition be filed and served according to law.

(Signed) H. C. Cage,
Judge.

May 22, 1922.

A true copy.

(Signed) H. J. Stansbury,
Deputy Clerk.

3-18-25.

CIVIL DISTRICT COURT

No. 134692 DIVISION "A"

ROBERT LEON MESSEL

versus

THE FOUNDATION COMPANY.

EXCEPTION TO SUPPLEMENTAL AND AMENDED PETITION.

And now into Court comes The Foundation Company and excepts to the Supplemental and Amended Petition of Plaintiff and for cause of exception says:

1. That said Petition changes the issue herein, after filing an exception of no cause of action and answer,

by attempting after the lapse of more than one year from the date of the injuries received to bring suit for compensation under Act 20 of 1914 and Acts amendatory thereof; that the action brought was brought under Articles of the Civil Code 2315 for damages as of tort.

2. That the claim for compensation now made is prescribed by one year under Article 31 of Act 20, 1914.

WHEREFORE, exceptor prays that these exceptions be maintained and the exception of no cause of action heretofore filed be also maintained and plaintiff's suit dismissed at his cost.

(Signed) P. M. Milner,
Attorney for Defendant.

A true copy.

(Signed) H. J. Stansbury,
Deputy Clerk.

New Orleans, La., March 18, 1925.

CIVIL DISTRICT COURT

No. 134692 DIVISION "A"

ROBERT LEON MESSEL

versus

THE FOUNDATION COMPANY.

JUDGMENT.

The exceptions herein filed by defendant came on this day to be heard.

Present: J. F. Pierson Attorney for Plaintiff.
P. M. Milner Attorney for Defendant.

When, after hearing pleadings and arguments of counsel, the Court considering all the exceptions filed by the defendant well founded, for the reasons dictated to the stenographer to be reduced to writing and filed of record,

It is ordered that all exceptions filed by the defendant be maintained and the suit of plaintiff Robert Leon Messel, against the defendant, the Foundation Company be dismissed.

Judgment read and rendered in open Court June 19th, 1922.

Judgment signed in open Court July 19th 1922.

(Signed) H. C. Cage,
Judge.

A true copy.
(Signed) H. J. Stansbury,
Deputy Clerk.
New Orleans, La., March 18, 1925.

SYLLABUS.

ROBT. L. MESSEL, Appellant,

versus

FOUNDATION CORPORATION.

Chas. F. Claiborne, Judge.

No. 8831.

It has been repeatedly held by the Supreme Court of this State that Act No. 20 of 1914, known as the Employers' Liability Act, is constitutional.

A State Court is without jurisdiction in an action brought under the Workmen's Compensation Act No. 20 of 1914, when plaintiff sustained injuries while aboard ship under a maritime contract.

Neither has it jurisdiction in an action brought under Arts. Civil Code 2315-2320 under like conditions.

The clause in the Judiciary Act saving to suitors "in all cases the right of a common law remedy where the common law is competent to give it" refers to remedies for enforcement of the Federal Maritime Law, and does not create substantive rights or assent to their creation by the States.

Judgment affirmed February 2nd, 1925.

No. 8831.

ROBERT LEON MESSEL

versus

FOUNDATION COMPANY.

APPEAL FROM CIVIL DISTRICT COURT, HONORABLE H. C. CAGE, JUDGE.

This is a suit by an employee against his employer under articles of the Civil Code, 2315 and 2320, and in the alternative under Act No. 20 of 1914 the Employers' Liability Act.

While employed aboard the S/S "La Grange" on July 9th, 1920 the plaintiff was injured. He sued defendant under Articles Civil Code 2315 and 2320 and pleads the unconstitutionality of Act No. 20 of 1914, upon the ground that in so far as said Act or Acts amendatory thereof, do or attempt to adjudge or fix the amount of the damage or reparation due or recoverable by petitioner for the casualties or damage inflicted as aforesaid on him, or to control the amount the petitioner may or shall recover, the said Act and the said Acts amendatory thereof are usurpation of the judicial powers and functions conferred upon the Courts of this State, as provided by Article 6 of the Constitution of

1913 which provides that every person for injury done him in his person shall have adequate remedy by due process of law and justice administered without denial, and said Acts or laws in violation of the prohibition of Article 17 of said Constitution and in violation of Section "1" of the 14th Amendment of the Constitution of the United States which provides that no State shall make or enforce any law which shall deny to any person within its jurisdiction the equal protection of the laws.

The plaintiff further alleged, that when injured as aforesaid he was engaged in maritime work in admiralty in the said Steamship "La Grange" on the navigable waters of the United States; that his legal rights to adequate relief for said injuries are the same in this cause against the owners as they are in admiralty against the vessel, and that Act No. 20 of 1914 has no application to them.

Plaintiff prayed for citation against the defendant corporation and for ten thousand dollars ($10,000.00) damages and that Act No. 20 of 1914 and all the Acts amendatory thereto be declared unconstitutional.

The defendant excepted that the petition disclosed no cause of action, for that plaintiff's action if any, was under Act No. 20 of 1914 and its amendments; and in other respects pleaded a general denial, contributory negligence, and negligence of fellow servant.

In a supplemental petition plaintiff, in the alternative prayed for judgment for the compensation fixed by Act No. 20 of 1914 and the Acts amending the same.

The defendant excepted to the supplemental petition on the ground,

First—That it changed the issue and,

Second—That it was prescribed by one year.

All the exceptions filed by the defendant were maintained, and plaintiff's suit was dismissed. He has appealed.

1st. The objections to the constitutionality of Act No. 20 of 1914 propounded by the plaintiff have been so often examined and overruled that a further discussion of them would be supererogatory, 142 La. 822-143 La. 951-368 and the numerous authorities there quoted 144 La. 820-146 La. 68.

2nd. If the plaintiff's right of action is under the Employers' Liability Act, then the State Courts have no jurisdiction of such demands ratione materiae.

This Court has twice decided that a State Court is without jurisdiction in an action brought under the Workmen's Compensation Act No. 20 of 1914 where plaintiff sustained injuries while aboard ship under maritime contract, Genna vs. Vogeman, No. 8772 Bk. 61 Nov. 13th, 1922, affirmed in Watson vs. Smith, 9060, June 11th, 1923 and in Poncet vs. Hooley No. 9095 May 28th, 1923 Bk. 63.

These decisions were in accord with the opinion of our Supreme Court, Lawson vs. N. Y. S. S. Co., 148 La. 290.

And in accord with decisions of the Supreme Court of the United States, Southern Pacific Co. vs. Jensen, 244 U. S. 206, affirmed in Knickerbocker vs. Stewart, 153 U. S. 149, and State vs. Dawson 264 U. S. 219.

In Peters vs. Veazel 251 U. S. 121 reversing our Supreme Court in 142 La. 1012, Veasey, while engaged as a longshoreman unloading the Steamer Seria, fell through the hatchway, the Court said:

> The work in which Veasey was engaged is maritime in its nature; his employment was a maritime contract, the injuries which he received were likewise maritime; and the rights and liabilities of the parties in connection therewith were matters clearly within the admiralty jurisdiction. In such circumstances, the Workmen's Compensation Law of the State had no application when the accident occurred. 234 U. S. 52-61; So. Pac. vs. Jensen, 244 U. S. 205, affirmed in Knickerbocker vs. Steward, 253 U. S. 149 (163), and in State vs. Dawson, 264 U. S. 219.

Third: In relation to the saving clause to the Judiciary Act, the Court said in Knickerbocker vs. Steward 253 U. S. 149.

> "That clause of the provision granting exclusive admiralty and maritime jurisdiction to the Federal Courts (Judiciary Act 1789, S. 9; Judicial Code, S. 24-256), which saves to suitors in all cases the right of a common law remedy, where the common law is competent to give it, refers to remedies for enforcement of the Federal Maritime Law, and does not create substantive rights or assent to

their creation by the States." Pages 159-161. See also So. Pac. vs. Jensen, 244 U. S. 206.

The case of Grey vs. Dry Dock 146 La. 826, seems contrary to the above decisions and to be overruled by Lawson, 148 La. 290.

> The object of the Judiciary Act was to secure a uniformity in the law, that there should not be one remedy for those proceeding under the maritime law and another for those appealing to common or civil law.

We are bound to take judicial cognizance of our want of jurisdiction, ratione materiae. 1 H. D. P. 332, No. 4.

We therefore come to the conclusion that an employee who suffers injury upon a vessel under a maritime contract cannot seek compensation in a State Court.

It is therefore ordered that the judgment appealed from be affirmed at plaintiff's costs. Judgment affirmed February 2, 1925.

Rehearing refused March 2nd, 1925.

A true copy.

(Signed) H. J. Stansbury,
Deputy Clerk.

March 18th, 1925.

No. 8831.

COURT OF APPEAL.

PARISH OF ORLEANS, STATE OF LOUISIANA.

ROBERT LEON MESSEL,
Plaintiff and Appellant,

versus

FOUNDATION COMPANY,
Defendant and Appellee.

PETITION FOR REHEARING.

To the Honorable Court of Appeal for the Parish of Orleans.

The petition of Robert Leon Messel, plaintiff and appellant, respectfully represents:

That the opinion and decree rendered in this cause on the 2nd day of February, 1925 is erroneous and contrary to the law and evidence, and prejudicial to the interest of petitioner, and that a rehearing should be granted in this matter. For the following reasons, to-wit:

1st. The Court is in error in holding that the State Court has no jurisdiction ratione materiae in an action brought under Art. Civil Code 2315-2320, for injury growing out of a maritime tort in a suit IN PERSONAM against the defendant.

2nd. The Court is in error in holding or maintaining that the clause in the Judiciary Act saving to suitors

> "In all cases the right of a common law remedy, where the common law is competent to give it,"

refers to remedies, for enforcement of the Federal maritime law, and does not create substantive rights or assent to ther creation by the State.

3rd. The Court is in error in holding or maintaining that an employee who suffers an injury upon a vessel under a maritime contract cannot under any circumstances seek compensation in a State Court.

Petitioner further shows that he files in connection with this petition, a brief in support thereof, and that for reasons hereinabove set forth and amplified in the said brief, a rehearing should be granted, and, finally, the judgment of the District Court should be reversed and set aside.

The premises considered, petitioner prays that, after due consideration, a rehearing be granted in this case, and that, finally the judgment of the District Court be avoided and reversed, and judgment rendered in favor of petitioner herein.

And for all general and equitable relief.

(Signed) Chas. I. Denechaud,
J. F. Pierson,
Claude L. Johnson,
Attorneys for Petitioner.

A true copy.
(Signed) H. J. Stansbury,
Deputy Clerk.
New Orleans, La., March 18, 1925.

No. 8831.

COURT OF APPEAL.

PARISH OF ORLEANS, STATE OF LOUISIANA.

ROBERT L. MESSEL,
Plaintiff-Appellant,

versus

FOUNDATION COMPANY,
Defendant-Appellee.

To the Foundation Company, defendant in the above entitled and numbered cause:

You are hereby notified, that, on behalf of Robert L. Messel, plaintiff and appellant in the above mentioned cause, we shall apply to the Honorable the Supreme Court of the State of Louisiana, for a writ of certiorari, to review the final decree of the Court of Appeal for the Parish of Orleans in this cause.

New Orleans, Louisiana, March 24th, 1925.

(Signed) Chas. I. Denechaud,
(Signed) J. F. Pierson,
(Signed) Claude L. Johnson,
Attorneys for Robert L. Messel.

A true copy.

(Signed) John Schroder,
Clerk.

New Orleans, March 24, 1925.

No. 8831.

COURT OF APPEAL.
PARISH OF ORLEANS, STATE OF LOUISIANA.

ROBERT L. MESSEL,
Plaintiff and Appellant,

versus

FOUNDATION COMPANY,
Defendant and Appellee.

STATE OF LOUISIANA,
PARISH OF ORLEANS.

BEFORE ME, the undersigned authority, personally came and appeared Claude L. Johnson, who first being duly sworn, deposes and says:

That he is one of the Attorneys for the plaintiff and appellant in the above and entitled and numbered cause and the petitioner notified in the foregoing petition, and that notification, in accordance with rule of this court was given of the intention to apply to this court for a writ of certiorari in this cause, same being addressed to the defendant and appellee, and deposited in the office of the clerk of the Court of Appeal

for the Parish of Orleans, in the words and figure following, to-wit:

"No. 8831.

COURT OF APPEAL.

PARISH OF ORLEANS, STATE OF LOUISIANA.

ROBERT L. MESSEL,
Plaintiff and Appellant,

versus

FOUNDATION COMPANY,
Defendant-Appellee.

To the Foundation Company, defendant in the above entitled and numbered cause:

You are hereby notified, that, on behalf of Robert L. Messel, plaintiff and appellant in the above mentioned cause, we shall apply to the Honorable the Supreme Court of the State of Louisiana, for a writ of certiorari, to review the final decree of the Court of Appeal for the Parish of Orleans in this cause.

New Orleans, Louisiana, March 24th, 1925.

Chas. I. Denechaud,
J. F. Pierson,
Claude L. Johnson,
Attys. for Robert L. Messel.
(Signed) Claude L. Johnson.

Sworn to and subscribed before me this 24th day of March, 1925.

(Signed) Ernest J. Robin,
Notary Public.

(Seal)

No. 27,169.

SUPREME COURT, STATE OF LOUISIANA.

ROBERT L. MESSEL

versus

FOUNDATION COMPANY.

Filed Mar. 31, 1925.
Percy J. Heines,
Deputy Clerk.

In Re:

Robert L. Messel applied for certiorari or writ of review to the Court of Appeal, Parish of Orleans, State of Louisiana.

Chas. I. Denechaud, J. F. Pierson and C. L. Johnson,
Attorneys for Appellant.

Writ refused, judgment correct.

Monday, May 25th, 1925.

D. N. T.
C. A. O'N.
W. O.
J. R. L.
W. G. R.
H. F. B.

UNITED STATES OF AMERICA.
STATE OF LOUISIANA.

SUPREME COURT OF THE STATE OF LOUISIANA.

I, PAUL E. MORTIMER, Clerk of the Supreme Court of the State of Louisiana, do hereby certify the foregoing to be a true and correct copy of the application of Robert L. Messel, for certiorari, or writ of review, to the Court of Appeal, Parish of Orleans, filed in this court on the 31st day of March, 1925, in the cause entitled Robert Leon Messel vs. Foundation Company, bearing the No. 134,692 of the docket of the Civil District Court, Parish of Orleans, and No. 8831 of the docket of the Court of Appeal, Parish of Orleans; and also a true copy of the order of this, the Supreme Court of Louisiana, refusing said application; the said application bearing the No. 27,169 of the docket of this Court.

IN WITNESS WHEREOF, I hereunto sign my name and affix the seal of the Court aforesaid, at the city of New Orleans, this the 17th day of August, Anno Domini, one thousand, nine hundred and twenty-five.

Paul E. Mortimer,
(Seal) Clerk, Supreme Court of Louisiana.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 19, 1925

The petition herein for a writ of certiorari to the Supreme Court of the State of Louisiana is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1926

No. 202

ROBERT L. MESSEL,
Petitioner, Plaintiff and Appellant,

versus

FOUNDATION COMPANY,
Respondent, Defendant and Appellee.

Petition, Notice and Motion for Writ of Certiorari to the Supreme Court of the State of Louisiana.

Charles I. Denechaud,
James F. Pierson and
Claude L. Johnson,
Attorneys for Petitioner, Plaintiff and Appellant.

Montgomery-Andree Printing Co., Inc. 307 Chartres Street, New Orleans, La.

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In the

SUPREME COURT OF THE UNITED STATES.

October Term, 1925.

No......

ROBERT L. MESSEL,
Petitioner, Plaintiff and Appellant,

versus

FOUNDATION COMPANY,
Respondent, Defendant and Appellee.

To Foundation Company, Respondent, Defendant and Appellee, or Messrs. P. M. Milner and Philip S. Gidiere, his Attorneys of record:

This is to notify you that petitioner, plaintiff and appellant will, on or before the 25th day of August, 1925, present to the Supreme Court of the United States in its Court Room at Washington, D. C., his petition for Writ of Certiorari, together with a copy of the entire record in this case.

A copy of said petition and of the briefs accompanying said petition are delivered to you herewith.

New Orleans, La.,

August 15th, 1925.

Robert L. Messel, by
Charles I. Denechaud,
James F. Pierson and
Claude L. Johnson,
Attorneys for Petitioner, Plaintiff
and Appellant.

SUPREME COURT OF THE UNITED STATES.

ROBERT L. MESSEL

versus

FOUNDATION COMPANY

No.....

Application for Writ of Review Through Writ of Certiorari to the Supreme Court of the State of Louisiana.

I.

The petition of Robert L. Messel, of full age and majority and domiciled in the City of New Orleans, Louisiana, plaintiff in the cause entitled Robert L. Messel vs. Foundation Company, lately pending in the Supreme Court of the State of Louisiana, with respect, represents:

That in the said matter entitled Robert L. Messel vs. Foundation Company, No. 27169 of the Docket of the Supreme Court of the State of Louisiana, the Honorable the Supreme Court of the State of Louisiana did on the 25th day of May, 1925, render an opinion and decree, wherein a judgment of the Civil District Court

and of the Court of Appeal for the Parish of Orleans, rendered in favor of the said Foundation Company, defendant, was affirmed, as will appear by reference to the copy of said opinion and decree of the said Courts annexed hereto as part hereof.

II.

That under the rules of the said Supreme Court for the State of Louisiana an application for a rehearing from said opinion and decree is not permissible and that the said opinion and decree became final on the 8th day of June, 1925.

III.

That your petitioner has caused to be served on the Foundation Company, defendant, through its attorney of record, a notice of his intention to apply to this Court for a Writ of Certiorari and review, as will appear by reference to a copy of said notice annexed hereto and made a part hereof.

IV.

Your petitioner further shows that the said suit, entitled Robert L. Messel vs. Foundation Company, is an action **in personam** for personal injury, growing out of his employment in a maritime contract, the work itself being in its nature maritime, and the injury received being also maritime, the plaintiff basing his right of action on the clause in the Federal Judiciary Code, United States Compiled Statute 1233 (Judicial Code 256), "saving to suitors, in all cases the right of a common law remedy where the common law is competent to give it". The common law remedy being modified and set forth into the language of Article

2315, Revised Civil Code of the State of Louisiana: "every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." Plaintiff specially pleads his right to proceed in an action **in personam** under the said saving clause of the Federal Judiciary Code and said Article 2315 of the Revised Civil Code of the State of Louisiana.

V.

The defendant filed an exception of no right or cause of action and coupled with it as a part of the same document an answer wherein it set out in detail its contention that the plaintiff had no right or cause of action. Under the issues thus joined in the Civil District Court the case was fixed for trial on the exceptions, and after hearing the Court dismissed plaintiff's suit on the exceptions of no right or cause of action. This judgment and decree of the Civil District Court was affirmed by a judgment and decree of the Court of Appeal for the Parish of Orleans, Louisiana, and which said judgment of the Court of Appeal for the Parish of Orleans was in turn affirmed by the judgment and decree of the Supreme Court of the State of Louisiana on the 25th day of May, 1925, as hereinabove mentioned.

VI.

Petitioner shows that the Honorable the Supreme Court of the State of Louisiana erred in its judgment in affirming the judgment of the Court of Appeal for the Parish of Orleans, wherein it held:

(a) That the clause in the Federal Judiciary Act "saving to suitors, in all cases the right to a common law remedy, where the common law is competent to

give it", reference to remedies for enforcement of the Federal Maritime Law and does not create substantive rights or assent to their creation by the States, and does not permit of an action **in personam** in the State Court to enforce a right of action growing out of a maritime contract or tort;

(b) That an employee who suffers injury upon a vessel while engaged in a maritime contract can not seek damages in the State Court in an action **in personam** against the defendant;

(c) That it (the State Court) had no jurisdiction ratione materiae of an action to recover damages growing out of a maritime tort under the provisions of Article 2315 of the Revised Civil Code of Louisiana, "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it," even though the action was brought by a suit **in personam.**

Petitioner shows that the questions which your Honors must decide are:

First: whether or not a State Court has jurisdiction ratione materiae to hear and determine a proceeding **in personam** based on a tort action growing out of a maritime contract;

Second: whether or not an employee who is injured while engaged in work of a maritime nature and growing out of a maritime contract can elect to proceed in a State Court in a proceeding **in personam** under the saving clause of the Federal Judiciary Act, which reserves to the litigant "the right of a common law remedy where the common law is competent to give it";

Third: whether or not in an action **in personam** a common law remedy is embodied in the provisions of Article 2315 of the Revised Civil Code of Louisiana, "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."

VII.

Your petitioner shows that these questions are solely questions of law, and that they have been decided in the affirmative by this Court in a number of well reasoned decisions. This Court has always held that the State Courts have always had jurisdiction of a cause of action against a ship owner in contract or in tort, when he could be reached personally and money damages only were demanded. And that the right to be so heard was not taken away by the grant in the Constitution, but the right also to hear such cases as well as other cases of admiralty jurisdiction was given to the newly constituted Federal Judiciary. And that the jurisdiction of the Admiralty and of the common law courts was therefore to a certain extent concurrent. That the common law remedy saved to suitors is the right to proceed **in personam** against the defendant, which remedy the common law is competent to give.

In the case of **The Hine, 71 U. S. 555, 18 Law Edition 451,** this Court held: "suits by attachment may be had against an owner or part owner of a vessel, and his interest thus subjected to sale in a common law Court of the State.

Such actions as the common law gives may also be maintained **in personam** against the defendant in the

common law courts. See also **Taylor vs. Carryl, 61 U. S. 583, 15 Law Edition 1028.**

In the case of **Leon vs. Galceran, 78 U. S. 185, 20 Law Edition 74** (This case was an action that arose in the courts of Louisiana), this Court, in deciding that case, held: "Mariners in suits to recover for wages may proceed (in the State Court) against the owner or master of the ship **in personam.**

"Even where a maritime lien arises, the injured party may waive such lien and may resort to such common law remedy in the State Court, against the owner of the vessel."

In **"The Chace", 83 U. S. 185, 21 Law Edition 369,** this Court held, on page 372, "where the suit is in rem against the thing, the original jurisdiction is exclusively in the District Courts as provided in the 9th section of the Judiciary Act; but when the suit is **in personam** against the owner the party seeking redress may proceed by libel in the District Court, or he may, at his election, proceed . . . . in the State Court as in other cases of action cognizable in the State and Federal Courts exercising jurisdiction in common law cases.

"Examined carefully, it is evident that Congress intended by the provision (9th Section, Judiciary Act) to allow the party to seek redress in the Admiralty if he saw fit to do so, but not to make it compulsory in any case where the common law is competent to give him a remedy. Properly construed, a party under that provision may proceed **in rem** in the Admiralty, if a maritime lien arises, or he may bring a suit **in personam**

in the same jurisdiction, or he may elect not to go into Admiralty at all and may resort to his common law remedy in the State Courts." **Leon vs. Galceran supra.** See also **Schommaker vs. Gilmore, 102 U. S. 118, 26 Law Edition 95,** and **Chappell vs. Bradshaw, 128 U. S. 132, 32 Law Edition 369.**

These cases have fixed definitely the jurisprudence that the saving clause of the Federal Judiciary Act, "saving to suitors, in all cases the right of a common law remedy, where the common law is competent to give it", permits the party seeking redress of an injury growing out of a maritime contract or tort, to proceed **in personam** in the State Court. That for the foregoing reasons and for the protection of your petitioner's rights, and that since this application is based solely upon the ground that the decision of the Supreme Court of the State of Louisiana as to the correctness of the law involved is in conflict with the established jurisprudence of this Court as set forth herein, your petitioner is entitled to have this Honorable Court review the pleadings and the law, and pronounce final judgment of the issues thus raised. That your petitioner in support of this application will file briefs herein.

WHEREFORE, the premises considered, petitioner prays that a Writ of Certiorari issue herein commanding the Honorable Supreme Court of the State of Louisiana to send up to this Court the record hereinabove mentioned so that same may be reviewed, and that this Honorable Court may pronounce final judgment herein, and that the errors committed by the Honorable Supreme Court of the State of Louisiana

be corrected and that there be judgment reversing said opinion and decree of the said Supreme Court of the State of Louisiana, and that said cause be reinstated and remanded to the said State Court to be there proceeded with according to law. And your petitioner prays for all general and equitable relief.

Charles I. Denechaud,
James F. Pierson and
Claude L. Johnson,
Attorneys for Petitioner, Plaintiff
and Appellant.

AFFIDAVIT.

Before me, the undersigned authority, personally came and appeared Robert L. Messel, who, being duly sworn, deposes and says:

That he is the plaintiff herein, that he has read the above and foregoing petition and that all the allegations of fact therein contained are true and correct.

(Signed) Robert L. Messel.

Sworn to and subscribed before me this 15th day of August, 1925.

(Signed) Charles I. Denechaud,
Notary Public.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, [redacted] 1926

No. 6[redacted]202

ROBERT L. MESSEL,
Petitioner, Plaintiff and Appellant,

versus

FOUNDATION COMPANY,
Respondent, Defendant and Appellee.

Brief on Behalf of Robert L. Messel, in Support of His Application for Certiorari.

Charles I. Denechaud,
James F. Pierson and
Claude L. Johnson,
Attorneys for Petitioner, Plaintiff and Appellant.

Montgomery-Andree Printing Co., Inc. 307 Chartres Street, New Orleans, La

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In the

SUPREME COURT OF THE UNITED STATES.

October Term, 1925.

No.....

ROBERT L. MESSEL,

Petitioner, Plaintiff and Appellant,

versus

FOUNDATION COMPANY,

Respondent, Defendant and Appellee.

May it please the Court:

We appreciate the fact that your Honors are faced with a very much overcrowded docket. For that reason we would hesitate to add to your labors a consideration of this application for Certiorari but for the fact that we feel that a grave injury and injustice has been done to our client, Robert L. Messel, by the decision of the Supreme Court of the State of Louisiana in this matter, which denied to him the right to a hearing and trial vouchsafed to him by the Constitution and Statutes of the United States. We feel that the Supreme Court of the State of Louisiana has committed a very

grievous error in denying to petitioner a hearing and trial on the ground of want of jurisdiction **ratione materiae** to hear and determine in a suit **in personam,** his suit in a tort action growing out of a maritime contract. We feel that petitioner, Robert L. Messel, as a citizen of the United States, has been deprived of a right guaranteed to him by the Statutes and Constitution of the United States, to be entitled to a hearing and trial in a State Court in a suit **in personam** to recover for a maritime tort and not have this right denied to him.

STATEMENT OF THE CASE.

This suit is an action **in personam.** The petitioner, Robert L. Messel, filed his suit in the Civil District Court for the Parish of Orleans, Louisiana, claiming damages under Article 2315 of the Revised Civil Code of Louisiana, "every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." The plaintiff specially pleads his right to proceed under said Article in a suit **in personam** to recover damages for personal injuries growing out of a maritime contract, claiming that his right of action to so proceed is reserved to him by the Saving Clause in the Federal Judicial Code, 256, Section 9, "saving to suitor, in all cases the right of a common law remedy where the common law is competent to give it", and that the common law remedy or right of action reserved to litigant is codified and embodied in the provisions of said Article 2315 of the Revised Civil Code of Louisiana.

The plantiff was injured while engaged in the execution of a maritime contract on board the Steamship

LaGrange, lying in the Mississippi River at New Orleans. After citation the defendant appeared and filed its exception of no cause of action and its answer. The exception of no cause of action was based on the contention that the plaintiff's right, if any, was controlled and governed by the provisions of the Employers' Liability Act of Louisiana, known as Act No. 20 of 1914, and Amendments thereto, and not by the terms and provisions of Article 2315 of the Revised Civil Code.

On the trial of the exception in the Civil District Court the Court maintained the exception of no right or cause of action as contended for by the defendant, and dismissed plaintiff's suit. The plaintiff then prosecuted his appeal to the Court of Appeal for the Parish of Orleans, Louisiana, and the said Court of Appeal for the Parish of Orleans, Louisiana, affirmed the judgment of the Civil District Court for the Parish of Orleans on the ground,

First, that it, the State Court, had no jurisdiction **ratione materiae** in an action brought under Revised Civil Code 2315 for injury growing out of a maritime tort in a suit **in personam** against the defendant.

Second, that the clause in the Judicial Code, "saving to suitors in all cases the right of a common law remedy, where the common law is competent to give it", refers to remedies for enforcement of the Federal Maritime Law and does not create substantive rights or assent to their creation, and does not give a right to sue **in personam** for recovery of damages growing out of a maritime tort.

Third, that an employee who suffers an injury upon a vessel under a maritime contract can not under any circumstances seek compensation in a State Court.

Application for rehearing was duly made to the said Court of Appeal for the Parish of Orleans, which application was denied, and petitioner then applied to the Supreme Court of the State of Louisiana for a Writ of Certiorari to review the said Judgment and Decree of the said Court of Appeal for the Parish of Orleans. The said Supreme Court for the State of Louisiana on May 25th, 1925, denied the application for said Writ of Certiorari with the statement, "Writ refused; Judgment correct", thus approving and adopting and embodying the opinion and decree of the said Court of Appeal for the Parish of Orleans as its own opinion for refusing the application for the said Writ of Certiorari. The matter is now presented to your Honors on the record as thus made up.

THE FEDERAL QUESTION INVOLVED.

Paragraph 14 of plaintiff's original petition reads: "Petitioner represents that he is entitled to claim and recover under Civil Code, Article 2315 of this State, for the damages sustained by him arising from the casualties aforesaid and to have the amount of the reparation fixed and determined before the Court after due trial and hearing had."

Paragraph 18 of plaintiff's original petition reads: "Petitioner represents that he is a native born citizen of the United States and of the State of Louisiana. When injured as aforesaid he was engaged in marine work in Admiralty on the said Steamship LaGrange

on the navigable waters of the United States, said steamship being engaged in sea navigation between this port of New Orleans and other sea-ports, foreign and domestic, and that said injuries sustained on board the said steamship, repairing her smokestack in this port of New Orleans, entitled him to the action **in rem** in Admiralty against said vessel **or an action in personam against the owner and master of said vessel.**

In his application to the Court of Appeal for the Parish of Orleans for a rehearing the petitioner pleaded:

"First, the Court is in error in holding that the State Court has no jurisdiction **ratione materiae** in an action brought under Article Civil Code 2315, for injury growing out of a maritime tort in a suit **in personam** against the defendant.

"Second, the Court is in error in holding or maintaining that the clause in the Judiciary Act, 'Saving to suitors in all cases the right of a common law remedy, where the common law is competent to give it', refers to remedies for enforcement of the Federal Maritime Law, and does not create substantive rights or assent to their creation by the State.

"Third, the Court is in error in holding or maintaining that an employee who suffers an injury upon a vessel under a maritime contract cannot under any circumstances seek compensation in a State Court."

And in his application for a Writ of Certiorari to the Supreme Court of the State of Louisiana the petitioner again pleaded and reiterated his right to proceed in

the State Court in an action **in personam** to recover for an injury growing out of a maritime contract or tort. So that it is made to appear very clearly in the record that plaintiff pleaded and was relying upon the saving clause in the Federal Judiciary Code, 256, 9th Section, "saving to suitors in all cases the right of a common law remedy, where the common law is competent to give it."

AUTHORITIES RELIED UPON BY PETITIONER IN SUPPORT OF HIS APPLICATION.

This Court has in a number of well reasoned cases, and in every case where this question was presented, held that the common law remedy saved to suitors is the right to proceed **in personam** against the defendant, which remedy the common law is competent to give.

In discussing the question of Admiralty Jurisdiction in conjunction with the jurisdiction of the common law courts, **Benedict on Admiralty, 5th Edition, Section 20, Volume 1, page 24,** says:

> "The Constitution of the United States provides that the judicial power of the United States shall extend to 'all cases of Admiralty on the Maritime jurisdiction'. This does not mean that every case touching a ship or her affairs must necessarily be heard by a Federal Court sitting in Admiralty. The common law courts always had jurisdiction in a cause of action against a ship owner in contract or in tort when he could be reached **personally and money damages only were demanded.** That right was not taken away by the grant in the Constitution, but the right also to hear such cases as well as other cases of Admiralty

jurisdiction was given to the newly constituted Federal Judiciary. The jurisdiction of the Admiralty and the common law courts is therefore to a certain extent concurrent. The common law jurisdiction, when concurrent with Admiralty jurisdiction, may be exercised by State Courts."

Commenting further on this provision, the same author in Section 22 of the same Edition says:

"The Common Law remedy saved to suitors is the right to proceed **in personam** against the defendant, which remedy the Common Law is competent to give. Therefore a direct suit against the ship owner, e. g., to recover seaman's wages or damages for collusion or for breach of charter or for other personal demand, where jurisdiction of the person of defendant can be secured, may be brought either in Admiralty or in Common Law, the two Courts having in this respect concurrent jurisdiction."

And further commenting on the same question, this author in Section 23 of the same Edition, says:

"The right to proceed **in rem** is the distinctive remedy of the Admiralty and hence administered exclusively by the United States Courts at Admiralty; no State can confer jurisdiction upon its Courts to proceed **in rem,** nor could Congress give such power to a State, since it would be contrary to the constitutional grant of such power to the Federal Government. The saving clause of the Judiciary Act and of the Judicial Code does not contemplate Admiralty remedies in a Common Law court. Its meaning is that in cases of concurrent jurisdiction in Admiralty and in Common Law, the jurisdiction in the latter

> is not taken away. The remedy which State Courts may administer, though it may be the subject of regulation and modification by State Statute, must be according to the general course of the Common Law, the right to proceed **in rem,** according to methods in Maritime Law, is the exclusive jurisdiction of the civil causes of Admiralty and Maritime jurisdiction conferred upon the United States District Courts. So liens given by the laws of the State for matters which are subjects of Admiralty jurisdiction are enforceable against the thing only in the Federal Courts, though the debt on which the lien is founded may be sued for **in personam** in the State Courts."

The statements as to the jurisprudence on this question as given by the author of Benedict on Admiralty are founded upon and supported by the uninterrupted decisions of a number of well reasoned cases by this Court.

In the cases of **American Steamboat Company vs. Chace, 83 U. S. 185, 21st Law Edition 369,** this Court had under consideration the construction of the saving clause of the Judiciary Code, "saving to suitors in all cases the right of a common law remedy, where the common law is competent to give it." That case was a suit **in personam** in a State Court against a steamboat company for the recovery of damages for the death of plaintiffs intestate. The defendant pleaded that the saving clause in the Federal Judiciary Code did not apply. This Court held that the contention of the defendant was unsound.

Mr. Justice Clifford delivered the opinion, and in commenting on the question of jurisdiction of the

State Courts to enforce a common law remedy in suits growing out of a maritime tort, said, on page 372:

> "Questions of this kind can not arise in suits **in rem** to enforce maritime liens, and the Common Law is not competent to give such remedy, and the jurisdiction of the Admiralty Courts in such cases is conclusive. Such a question can only arise in personal suits where the remedy, in the two jurisdictions, is without any special difference. Examined carefully, it is evident that Congress intended by that provision to allow the party to seek redress in the Admiralty, if he saw fit to do so, but not to make it compulsory in any cases where the Common Law is competent to give him a remedy. Properly construed, a party under that provision may proceed **in rem** in the Admiralty if a maritime lien arises, or he may bring suit **in personam** in the same jurisdiction, or he may elect not to go into Admiralty at all, **and may resort to his Common Law remedy in the State Courts.**"

In the case of **Leon vs. Galceron, 78 U. S. 185, 20 Law Edition 74,** the Court also had under consideration the construction of the same clause in the Judiciary Act. That case arose under the Louisiana law. It was an action **in personam,** although the vessel itself was seized under a Writ of Sequestration. Mr. Justice Clifford was also the organ of the Court in that case and, on page 75, said:

> "Mariners in suits to recover for wages may proceed against the owner or master of the ship **in personam** or they may proceed **in rem** against the ship or ship and freight at their election.
>
> "When the suit is **in rem** against the ship the original jurisdiction of the controversy

> is exclusively in the District Court; but when the suit is **in personam** against the owner or master of the vessel, the mariner may proceed by libel in the District Court, or he may at his election proceed in an action of law . . . . in a State Court as in other causes of action cognizable in the State Courts exercising jurisdiction in Common Law cases."

Proceeding further with its reasoning, the Court said:

> "Such a plaintiff may proceed **in rem** in Admiralty and if he elects to pursue his remedy in that mode, he can not proceed in any other forum, as the jurisdiction of the Admiralty Courts is exclusive in respect to that mode of proceeding, but such a party is not restricted to that mode of procedure even in the Admiralty Courts, as he may waive his lien and proceed **in personam** against the owner or master of the vessel in the same jurisdiction, nor is he compelled to proceed in Admiralty at all, as he may resort to his Common Law remedy in the State Courts, saved to suitors by virtue of the saving clause in the Ninth Section of the Judicial Act conferring jurisdiction in Admiralty cases upon the District Courts, the right of a Common Law remedy in all cases, where the Common Law is competent to give it, and the Common Law is as competent as the Admiralty to give a remedy in all cases where the suit is **in personam.**"

And the Court finally concluded its opinion with the following statement:

> "Even when a maritime lien arises, the injured party if he sees fit may waive his lien and proceed by a libel **in personam** in the Ad-

> miralty, or he may elect not to go into Admiralty at all, and may resort to his Common Law remedy, as the plaintiffs in these cases did, in a subordinate Court. They brought suits in the State Courts against the owner of the schooner, as they had a right to do."

In the case of **Knapp vs. McCaffery, 177 U. S. 638,** in which case also this question was involved, the Court said:

> "The true distinction between such proceedings as are and such as are not invasions of the exclusive Admiralty jurisdiction is this: If the cause of action be one cognizable in Admiralty and a suit be **in rem** against a thing itself, though a monition be also issued to the owner the proceeding is essentially one in Admiralty. If, upon the other hand, the cause of action be not one in which a Court of Admiralty has jurisdiction or if the suit be **in personam** against an individual defendant with an auxiliary attachment against a particular thing or against the property of the defendant in general, it is essentially a proceeding according to the course of Common Law and within the saving clause of the Statute of a Common Law remedy."

This rule was also applied in the **Glide, 167 U. S. 606; Johnson's Chicago Elevator, 119 U. S. 388; The Hine Trevor, 71 U. S. 555; Taylor vs. Carryl, 61 U. S. 583.**

The Louisiana jurisprudence on the question at issue is set forth and decided in the case of **Gray vs. New Orleans Dry Dock and Shipping Company, 146 Louisiana Ann. 826.** The plaintiff in that case was injured while engaged in maritime employment. The action

was predicated on Article 2315 of the Civil Code. The defendant in that case pleaded that the plaintiff's right of action, if any, was governed and controlled by Workmen's Compensation Act, Act No. 20, 1914, and not by the provisions of Article 2315 of the Revised Civil Code of Louisiana, as pleaded by the plaintiff.

In deciding the matter, Mr. Justice O'Niell, as the organ of the Court, said:

> "The work in which plaintiff was engaged at the time he was injured was maritime in its nature; his employment was a maritime contract, and his claim for damages was enforceable in the Admiralty and the Maritime jurisdiction. For that reason, before the passage of the Act of Congress of October 6th, 1917, the Employers' Liability Act was not pertinent, and did not deprive the plaintiff of the right of a Common Law remedy. We say 'Common Law' because Article 2315 of the Civil Code of this State is only an embodiment of the Common Law right of action for tort, viz: 'Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it'."

We respectfully submit that for the foregoing reasons a Writ of Certiorari should issue herein as prayed for in plaintiff's petition.

Respectfully submitted,

Charles I. Denechaud,
James F. Pierson and
Claude L. Johnson,
Attorneys for Petitioner, Plaintiff and Appellant.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1926.

No. 202.

ROBERT L. MESSEL,
Petitioner, Plaintiff and Appellant,

versus

FOUNDATION COMPANY,
Respondent, Defendant and Appellee.

SUPPLEMENTAL BRIEF ON MOTION TO DISMISS OR AFFIRM APPEAL.

PURNELL M. MILNER,
Attorney for
Respondent, Defendant and Appellee.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1926.

No. 202.

ROBERT L. MESSEL,
Petitioner, Plaintiff and Appellant,

versus

FOUNDATION COMPANY,
Respondent, Defendant and Appellee.

SUPPLEMENTAL BRIEF ON MOTION TO DISMISS OR AFFIRM APPEAL.

This application for certiorari to the Supreme Court of Louisiana seems to us to assert the right to substantive relief and a remedy in the State of Louisiana, under the saving clause of the original Judiciary Act of 1789, §9; Judicial Code §§24-256.

As presented to this Court, no question relating to or involving the Workmen's Compensation Act of the

State of Louisiana, Act 20 of 1914, either constitutionally or otherwise is raised.

There is also no question raised as to plaintiff in writ being engaged at the time of his injury under a maritime contract of employment on navigable waters of the United States; that is for the purpose of this action, the suit having been dismissed on exceptions of no cause of action and prescription. The allegations of the petition are taken for true.

The cause is, therefore, to be decided within very narrow limits.

The admiralty court's jurisdiction, in this case, is not denied.

The plaintiff, however, declines to pursue his remedy in the exclusive jurisdiction of the admiralty court, but asserts, under the saving clause of the Judciary Act of 1789, which saves to suitors in all cases the right of a common law remedy, where the common law is competent to give it, that he has a right of action in the State Court of Louisiana under Article of the Civil Code 2315, reading: "Every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it," etc.

If this article of the Civil Code were in force and effect at the time of the injury and at the date of institution of his suit in the State Court, the plaintiff's contention would be correct.

But Article 2315 of the Louisiana Civil Code, in so far as furnishing an action and giving a remedy to Plaintiff, in the State Court, is concerned, was repealed and superseded by Act 20 of 1914, known as the Workmen's Compensation Act, repeatedly held constitutional by the Louisiana Supreme Court, Day vs.

La. Cent. Lumber Co., 144 La. An. 820. This was decided by the Supreme Court of Louisiana in

Williams vs. Blodget Construction Co., 146 La. An. 842-843.

Colorado vs. Johnson Iron Works, 146 La. An. 68.

Philips vs. Guy Drilling Co., 143 La. An. 951.

Despite this fact, plaintiff claims the right to proceed under Article 2315 of the Civil Code, which has been repealed since 1914.

This Court said in Knickerbocker vs. Stewart, 253 U. S. 149:

> "That clause of the provision granting exclusive admiralty and maritime jurisdiction to the Federal Courts (Judiciary Act, 1789, §9; Judicial Code §§24-256), which saves to suitors in all cases the right of a common law remedy, where the common law is competent to give it, refers to remedies for the enforcement of the Federal Maritime Law, and does not create substantive rights or assent to their creation by the States."

The Supreme Court of Louisiana, mindful of the repeal of article 2315 since Act 20 of 1914, and of its decisions so holding, adopted this statement of this Court and dismissed the plaintiff's suit.

The plaintiff's argument would seem to demand that some substantive relief or remedy be created for him in the state court or to assert, impliedly, as he does not directly, that the Legislature of Louisiana could not repeal Art. 2315 of the Civil Code.

He has not asserted that there exists in our United States Constitution any control of the actions that may be allowed or the remedies that may be granted

in a jurisdictional way by our state constitution to our Courts, nor has he pointed out any provision of the United States Constitution which prohibits in any manner the creation of remedies or actions for damages for injuries received or their repeal or modification as our Legislature may see fit to pass.

This Court said in State Industrial Commission vs. Nordenholt Corp., 259 U. S. 273-275: "Under the doctrine approved in Southern P. Co. v. Jensen, no state has power to abolish the well-recognized maritime rule concerning measure of recovery, and substitute therefor the full indemnity rule of the common law. Such a substitution would distinctly and definitely change or add to the settled maritime law; and it would be destructive of the 'uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.' "

This Court in the Knickerbocker case explained that a "saving" clause operated to preserve something already in existence, not to create substantive rights; hence, we take it that, where a state recognizes either the common law remedy for actions for damages for injuries received or by statute creates a right of action and enforces a remedy, a suitor entitled to an action in damages in the Admiralty Court may take advantage of the actions and remedies afforded by the state statute and proceed accordingly.

But where no such action is accorded; where the rights and remedies formerly accorded have been repealed by the State Legislature, and there is no common law remedy afforded in the state practice, is it not too clear for argument that the suitor is relegated to his suit in admiralty?

Can he complain because a state has, within its plenary powers, unhampered by any provision or prohibition in the United States Constitution, failed to create a substantive right of action for damages for injuries in the State Court; or if such right formerly existed, has he any cause to complain if it is repealed?

If the "Saving Clause" of the Judiciary Act of 1789, §9 and Judicial Code §§24-256 did not "Create" these substantive rights and did not operate to compel their creation, then a suitor must take the State laws, actions and remedies as he finds them, and if a state affords neither a common law remedy nor a statutory remedy of which he may avail himself, under the jurisprudence of this Court, he is relegated to his suit in admiralty.

And thus he avails himself of all the rights, actions and remedies which the Constitution of the United States and our laws and jurisprudence accord.

For these reasons, we believe that the motion to dismiss or affirm the appeal taken should be granted.

PURNELL M. MILNER,
Attorney for
Respondent, Defendant and Appellee.

I certify I have received copy of the foregoing Brief.

CLAUDE L. JOHNSON,
Attorney for Petitioner, Plaintiff and Appellant.

Washington, D. C.,
March 8, 1927.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 6[redacted]202

ROBERT L. MESSEL,
Petitioner, Plaintiff and Appellant,

versus

FOUNDATION COMPANY,
Respondent, Defendant and Appellee.

Motion to Dismiss or Affirm Appeal, and Brief in Support of Said Motion.

PURNELL M. MILNER,
Attorney for Respondent, Defendant and Appellee.

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AUTHORITIES.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1926.

NO. 694.

ROBERT L. MESSEL,
Petitioner, Plaintiff and Appellant,

versus

FOUNDATION COMPANY,
Respondent, Defendant and Appellee.

COMES NOW the Appellee herein, the FOUNDATION COMPANY, by PURNELL M. MILNER, its Counsel, appearing in that behalf, and moves the Court to dismiss the appeal in the above entilted cause for want of jurisdiction because:

The judgment or decree from which the said appeal purports to have been taken is the judgment or decree of the Supreme Court of one of the United States, to-wit, the Supreme Court of the State of Louisiana, maintaining the plea of one year's prescription to an action for compensation under the State Employers' Liability Act, Act No. 20 of the Legislature of 1914, being a matter of practice and remedy exclu-

sively and finally within the jurisdiction of said State Court, and the said Appellee by counsel as aforesaid also moves the Court to affirm the said judgment or decree from which the said appeal purports to have been taken because, although the record in said cause may show that this Court has jurisdiction in the premises, yet it is manifest that the said appeal was taken for delay only or is manifestly frivolous, for that the plaintiff and appellant, alleging a maritime tort, sought relief in an action *in personam* in the State Court under Article 2315 of the Revised Civil Code of Louisiana, which the State Supreme Court has held was superceded by the Employers' Liability or Compensation Act passed by the Legislature and known as Act No. 20 of 1914 in all cases of hazardous employment and further later after one year sought relief, in the alternative under said Employers' Liability or Compensation Act; the jurisprudence of this Court in the *Jensen case, 234 U. S., 52*, and in the *Knickerbocker case, 253 U. S., 149*, having settled the jurisprudence that the remedy under the Workmen's Compensation Law of a State is not the remedy saved to suitors under the Judiciary Act of 1789, and Judicial Code, §§ 24-256.

PURNELL M. MILNER,

Attorney for Defendant and Appellee.

AFFIDAVIT.

STATE OF LOUISIANA,
PARISH OF ORLEANS.

Before me, the undersigned Notary Public, personally came and appeared Purnell M. Milner, attorney for defendant and appellant in the suit of *Robert L. Messel v. Foundation Company*, No. 694 of the docket of the Supreme Court of the United States and on being sworn deposes and says that on Friday, March 4, 1927, he served the foregoing motion to affirm or dismiss together with Brief in support thereof upon Chas. I. Denechaud and Claude L. Johnson, attorneys for Robert L. Messel, plaintiff and appellant.

P. M. Milner.

Sworn to and subscribed
before me the 4th day of
March, 1927.

Wm. A. Porteous, Jr.,
Notary Public.

We acknowledge receipt of copy of the above motion, with brief in support thereof, and hereby waive the requirement of three weeks notice before submitting motion, and agree that the same may be submitted on the day fixed for the hearing of this cause.

New Orleans, La.,
March 4, 1927.

Claude L. Johnson,
Attorney for Plaintiff and Appellant,
Robert L. Messel.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1926.

NO. 694.

ROBERT L. MESSEL,
Petitioner, Plaintiff and Appellant,

versus

FOUNDATION COMPANY,
Respondent, Defendant and Appellee.

ORIGINAL BRIEF ON MOTION TO DISMISS OR AFFIRM.

Our motion to dismiss for want of jurisdiction is predicated on the fact that the lower State Court which had jurisdiction of this case, maintained the plea of one year's prescription to plaintiff's suit, which judgment was affirmed by the Circuit Court of Appeals for the State and affirmed by the Supreme Court of Louisiana.

This Court, we believe, is without jurisdiction to review a final judgment of the highest Court of the State, dismissing an action founded upon a State statute, upon a plea of prescription, or brought beyond the time stipulated in the Act within which the case must be brought or be forever barred.

This suit grew out of an alleged maritime tort and was brought *in personam* against the owner of the vessel, Foundation Company, under Article 2315 of the Civil Code of Louisiana. This article of the Civil Code provides that "Every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it," etc.

The suit was instituted on the 23rd day of December, 1920, under Article 2315 of the Civil Code of Louisiana, for injury and damages alleged to have been received in July, 1920. The Workmen's Compensation Statute, Act 20 of 1914, as amended, was attacked as unconstitutional and no relief was prayed for thereunder.

An exception of no right or cause of action was filed, based on jurisprudence of the State that the Workmen's Compensation Statute, Act 20 of 1914, was exclusive as to the rights and remedies for injuries received by employees engaged in a hazardous occupation. The Act, *Section 1, Paragraph 2 (2)*, makes the operation, construction, repair, removal, maintenance and demolition of vessels, boats and other water crafts as hazardous, as follows:

> *Section 1.* Be it enacted by the general assembly of the State of Louisiana, that this act shall apply only to the following:
>
> *1.* ———————————
>
> *2.* Every person performing services arising out of and incidental to his employment in the course of his employer's trade,

business or occupation in the following hazardous trades businesses and occupations:

(2) The operation, construction, repair, removal, maintenance and demolition of railways and railroads, vessels, boats and other water craft, etc., etc.

Section 34 of the Act provides:

"That the rights and remedies herein granted to an employee on account of a personal injury for which he is entitled to compensation under this Act shall be *exclusive* of all other rights and remedies of such employee, his personal representatives, dependants, relations or otherwise, on account of such injury."

The Supreme Court of Louisiana, in *Colorado v. Johnson Iron Works, 146 La. An., 68 (83 So., 381)*, decided (syllabus):

"Employers' Liability Act provides exclusive remedy of servant killed in the course of his employment, and supercedes Civ. Code Art. 2315 giving widow right of action for wrongful death."

To same effect: *Philips v. Guy Drilling Co., 143 La. An., 951.*

The Supreme Court of Louisana has repeatedly held that this Act was constitutional.

Day v. Louisiana Central Lumber Co. 144 La. An., 820 (81 So., 328).

On *May 22nd, 1922*, a supplemental petition was filed by plaintiff, asking, in the alternative, *for the first time*, if the Workmen's Compensation Statute was constitutional, that the plaintiff be allowed compensation accordingly.

To this supplemental and amended petition, the Foundation Company filed exception:

(1) Change of issue.

(2) Prescription of one year. (Tr., pp. 25-26.)

The Compensation Statute, *Act 20 of 1914*, as amended, provides, *Section 31:*

> "That in case of personal injury (including death resulting therefrom) *all claims for payments shall be forever barred unless within one year after injury or death the party* shall have agreed the payment to be made under this Act, or *unless one year after the injury proceedings have been begun as provided in Section 17 and 18 of this Act.*" (Italics ours.)

The exceptions were argued before Judge Hugh C. Cage, Judge of the Civil District Court for the Parish of Orleans, State of Louisiana. The exceptions were maintained, as shown by the following order (Tr., p. 27):

> "When after hearing pleadings and arguments of counsel, the Court considering all the exceptions filed by the defendant well founded for reasons dictated to the stenog-

rapher to be reduced to writing and filed of record,

"It is ordered that all exceptions filed by the defendant be maintained and the suit of plaintiff, Robert Leon Messel, against the defendant, the Foundation Company, be dismissed."

We respectfully urge that this Court is without jurisdiction to review a final judgment of the highest Court of a State, maintaining a plea of prescription of one year to the action, prescribed by the very statute under the provisions of which the plaintiff seeks to recover, dismissing plaintiff's suit. The entire suit is dismissed.

Our motion to affirm the decree of the State Supreme Court and Court of Appeals is based on the jurisprudence established by this Court in *Peters v. Veasey, 251 U. S., 121.*

The Supreme Court of Louisiana in this case reported in *142 La. An., 1012*, held that the Act of October 6, 1917, amending the Judicial Code, Secs. 24 and 256, saving to claimants the rights and remedies under the Workmen's Compensation Law of any State was retroactive and gave Veasey a right of action in the State Court, although his employment was maritime in its nature and a maritime contract.

This Court reversed the finding, held the act not retroactive, held that the matter was clearly within the admiralty jurisdiction and in such case the Workmen's Compensation Law of the State had no application when the accident occurred.

This was held again in the case of *Southern Pacific Co. v. Jensen, 244 U. S., 219.*

Both of these cases were decided on claims originating prior to the Act of October 6, 1917, amending the Judicial Code, Sections 24 and 256. This amendment was later decided to be unconstitutional in the case of *Knickerbocker Ice Co. v. Stewart, 253 U. S., 149.* This, we take it, left the law as it was prior to the passage of this amendment.

At the date of the accident, July 9, 1920, when petitioner was injured while engaged on a martime contract, he had his remedy in admiralty exclusively, for the reason that in so far as the State of Louisiana is concerned, by the passage of Act 20 of 1914, known as the Workmen's Compensation Act, the plaintiff was precluded from bringing an action under Art. 2315 of the Civil Code reading, "Every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it," etc., and was restricted to the exclusive remedy of compensation, for injuries received by employees engaged in hazardous work, set forth by Act 20 of 1914. In effect, in all cases of injury received in hazardous works, this Art. 2315 of the Civil Code is repealed.

Williams v. Blodgett Construction Co., 146 La. An., 842-843.

Colorado v. Johnson Iron Works, 146 La. An., 68.

Philips v. Guy Drilling Co., 143 La. An., 951.

If, therefore, the remedy given by the State Workmen's Compensation Act, Act 20 of 1914, is not the common law remedy saved to suitors in the Judi-

ciary Act, and if this act, being held repeatedly constitutional by the Supreme Court of Louisiana, is the *exclusive* remedy known to our law for redress for injuries received in hazardous occupations, thereby, in such case, repealing the statutory remedy of our Civil Law, Art. 2315 of the Civil Code, manifestly the plaintiff is without remedy in the State and is relegated to his action in admiralty, which is left unimpaired.

Under these circumstances the ruling of the highest Court of Louisiana, the Court of Appeals for the Parish of Orleans, having jurisdiction of this cause, concurred in by the Supreme Court, is correct and should be affirmed to the effect that an employee who suffers injury upon a vessel under a maritime contract cannot seek compensation in a State Court, and its finding that it is without jurisdiction *ratione materiae* is correct, conclusive and binding.

In *Lawson v. New York & P. R. S. S. Co., 148 La. An., p. 294*, the Supreme Court dismissed plaintiff's suit after the decision in the *Knickerbocker Ice Co. v. Stewart Case, 253 U. S., 149*, saying:

> "As this suit is brought upon a maritime contract, over which the District Courts of the United States have exclusive original jurisdiction, the suit will have to be dismissed."

The case of *Gray v. New Orleans Dry Dock & Shipbuilding Co., 146 La. An., 834*, relied on by plaintiff and appellant was, in effect, overruled by the case of *Lawson v. New York & P. R. S. S. Co., 148 La. An., p. 294*, just cited, and by the decision in this case by

refusing the writ of review applied for by plaintiff to the Supreme Court of the State from the decree of the Circuit Court of Appeals, in following words: "Writ refused, judgment correct."

Just as the Legislature of the State of Louisiana had the right to enact Article of the Civil Code 2315 compensating one for injuries received by the fault of another, so it had the right in hazardous occupations to declare, as it did, by Act 20 of 1914, that thereafter the remedies and compensations accorded by this Act 20 of 1914 should be *exclusive*, and thus to repeal Article of the Civil Code 2315, in all cases of hazardous occupations where injury was received. Therefore, in the absence of a common law remedy under the Louisiana Civil Law, and upon repeal of the statute which alone recognized rights which otherwise and under another system of law would be known as common law rights, there was nothing left to employees who are injured in hazardous occupations but the Workmen's Compensation Law, Act 20 of 1914. And, as this Court has held that such Compensation Laws are not the common law remedy contemplated in the original judiciary act, the plaintiff and appellant in this case is relegated to his admiralty action in the District Court of the United States.

We respectfully ask that this writ of error be dismissed, or that the judgment of the Louisiana Supreme Court be affirmed, dismissing plaintiff's suit.

Respectfully submitted,

PURNELL M. MILNER,
Attorney for Defendant and Appellee.

SUPREME COURT OF THE UNITED STATES.

No. 202.—October Term, 1926.

Robert L. Messel, Petitioner, *vs.* Foundation Company, Respondent. } On Writ of Certiorari to the Supreme Court of the State of Louisiana.

[May 31, 1927.]

Mr. Chief Justice Taft delivered the opinion of the Court.

On December 20, 1920, Robert L. Messel filed a suit in the Civil District Court for the Parish of Orleans, State of Louisiana, to recover $10,000 for damages for personal injuries from the Foundation Company, a corporation of the State of New York doing business in Louisiana as a ship builder and repairer of sea-going steamships. The facts as averred in his petition were as follows: He was employed by the Foundation Company in September, 1919, as a helper to a boilermaker. He was sent with the boilermaker on board the steamship *LaGrange*, then afloat on the Mississippi River at New Orleans. The task to be performed was to add eight feet to the smokestack of the steamer. The two men were furnished ladders to ascend to the top of the stack and while engaged in the work, Messel was brought directly over the mouth of the steam escape pipe running from the engine room. While he was so engaged, scalding steam was allowed to escape from the pipe. It overcame him, and inflicted serious injuries.

The 14th paragraph of his petition is:

"Petitioner represents that he is entitled to claim and recover under Civil Code Article 2315 of this State all the damages sustained by him arising from the casualties aforesaid, . . . and not by the workman's compensation act of that state, known as Act No. 20 of 1914 and its amendments."

In his petition he attacks the Louisiana Workman's Compensation Act known as Act No. 20 of 1914, as invalid under the state constitution. He says that when injured he was engaged in marine work in admiralty on the steamship on the navigable waters of the United States, and that this entitled him to an action *in personam* against

the owner and master of the vessel, but that as the owner and master had departed from the port for a foreign port before he was able to bring his action in admiralty, and as the Foundation Company holds indemnity against any loss to it on account of the damage claimed, he prays for judgment against his employer.

The Foundation Company excepted to the petition on the ground that it disclosed no legal cause of action, but in the event that the exception should be overruled, the company admitted the averments of the petition save that it charged that the petitioner was guilty of gross negligence, and assumed the risk, and that the injuries received were due to his own fault or were caused by the negligence of a fellow servant. It denied the extent of the damage; said that the petitioner was precluded from bringing his action under Article 2315 of the Civil Code but must bring it under the state workman's compensation act.

Messel amended his petition reaffirming the averments of his original petition but in the alternative asked, if it should be held that the workman's compensation act of Louisiana was not unconstitutional and did apply, that he have compensation under that act in $4,000 or in $10 a week for four hundred weeks provided in the act. This amendment was filed May 22, 1922, by order of court. An exception by respondent was taken on the ground that the amended petition had changed the issue and was an attempt, after the lapse of more than one year from the date of the injuries, to bring the suit under the workman's compensation act, while the original action was brought under Civil Code 2315 for damages for a tort, that the claim was therefore prescribed under Article 31 of Act No. 20 of 1914. By a judgment of July 19, 1922, the exceptions filed by the Foundation Company were sustained and the suit against it was dismissed.

The Court of Appeals of the Parish of Orleans to which the case was then taken on appeal held that the objections to the constitutionality of the workman's compensation act could not be sustained. It further decided that if the petitioner's right of action was not under the workman's compensation act, the state courts had no jurisdiction of such demands *ratione materiae*, that it had twice decided that the state court was without jurisdiction in an action brought under the workman's compensation act where the plaintiffs sustained injuries while aboard a ship under a maritime contract, that these decisions were in accord with the opinion of the Supreme Court of Louisiana in *Lawson* v. *New York Steamship Company*,

148 La. 290, and with the decisions of this Court in *Southern Pacific* v. *Jensen*, 244 U. S. 206, affirmed in *Knickerbocker* v. *Stewart*, 153 U. S. 149, and *State* v. *Dawson*, 264 U. S. 219, and in *Peters* v. *Veasey*, 251 U. S. 121 and that an employee like Messel who suffered injury upon a vessel under a maritime contract of employment could not obtain compensation in a state court of Louisiana.

Application was then made to the Supreme Court of Louisiana for a writ of certiorari to review the decree of dismissal by the Court of Appeals. The writ was refused by the Supreme Court on the ground that the judgment was correct, May 25, 1925.

Article 2315 of the Revised Code of Louisiana under which Messel sought recovery is as follows: "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."

The workman's compensation act No. 20 of the Acts of 1914, as amended in subsequent acts, provides for the prosecution of claims for personal injuries in certain hazardous trades, businesses and occupations, includes the operation, construction, repair, removal, maintenance and demolition of vessels, boats and other water craft, and provides certain payments for such injuries. Section 34 of the act provides that the rights and remedies therein granted to an employee on account of personal injury, for which he is entitled to compensation under the act, shall be exclusive of all other rights and remedies of such employee, his personal representative, dependents, relations or otherwise, on account of such injury.

The argument of the Court of appeals in reaching its conclusion in this case was that because it had been held in *Peters* v. *Veasey*, *Southern Pacific Company* v. *Jensen*, *Knickerbocker Ice Company* v. *Stewart*, and in *State* v. *Dawson*, that a workman's compensation act could have no application to an injury to one working as an employee on a vessel afloat on the waters of the United States where his work was upon a maritime contract, and the rights and liabilities of the parties were matters clearly within the admiralty jurisdiction, a state court had no power to consider and decide a claim that must rest on the maritime law, because the workman's compensation act was made exclusive by its terms and prevented the operation and application of section 2315 granting what was equivalent to a common law remedy in the enforcement of such a maritime claim. At first this decision would seem to be conclusive upon us, because it would seem to be a construction by the Louisiana

state court of the jurisdiction conferred by its own statute upon its own courts. But this is a misconception of what the court actually decided in respect to the statute. The workman's compensation act did not by its terms include a maritime injury or tort under the Federal law such as is the basis of this suit. The state court's ruling, as we conceive it, was not that section 2315 was not broad enough to include a suit for a maritime tort as between master and servant if the Federal law permitted it, but that the Federal law does not permit it and, therefore, such a suit can only be maintained in a Federal admiralty court. That is an erroneous view of the rulings of our Court as to the application of workmen's compensation acts. Section 2315 offers a remedy in the state court for any act whatever of man that causes damage to another and obliges him by whose fault it happened to repair it. That includes everything except what the workman's compensation act bars from recovery under this general section. The workman's compensation act does not bar from recovery suit for damages against another for a maritime tort. Clearly therefore suit for such a tort is not excluded from the jurisdiction of the state court under section 2315 unless the Federal law forbids. To hold that the Federal law forbids would be to deprive the petitioner in this case of the right secured to him under the Judiciary Act of 1789, section 9, as now contained in paragraph third of section 256 of the Judicial Code, which gives exclusive jurisdiction in courts of the United States of all civil causes of admiralty and maritime jurisdiction, "saving to suitors in all cases the right of a common law remedy where the common law is competent to give it."

Section 2315 has been held by the Supreme Court of Louisiana to furnish the equivalent of the common law. In *Gray* v. *New Orleans Dry Dock and Shipping Company*, 146 La. Ann. 826, a case very much like this, a workman was injured while engaged in maritime employment. His action invoked Article 2315 of the Civil Code. The respondent in the case pleaded that the petitioner's right of action, if any, was governed by the workman's compensation act No. 20 of 1914, and not by the provisions of Article 2315 of the Revised Civil Code of Louisiana, as pleaded by the plaintiffs. The Supreme Court of Louisiana said:

"The work in which plaintiff was engaged at the time he was injured was maritime in its nature; his employment was a maritime contract, and his claim for damages was enforceable in the

Admiralty and Maritime jurisdiction. For that reason, before the passage of the Act of Congress of October 6, 1917, the Employer's Liability Act was not pertinent, and did not deprive the plaintiff of the right of a Common Law remedy. We say 'Common Law' because Article 2315 of the Civil Code of this State is only an embodiment of the Common Law right of action for tort, viz: 'Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it' ".

The fact that Messel in the alternative asked for a recovery under the workman's compensation act could not defeat him in his continuous request to proceed under Article 2315, and as the original action invoked Article 2315, and he is still invoking the remedy provided by that Article, there would seem to be no opportunity for the operation of the prescription of one year provided by the Louisiana workman's compensation act. Messel's attack upon the workman's compensation act as unconstitutional under the constitution of Louisiana was entirely irrelevant and should be rejected as surplusage.

As Messel has resorted to the state court, and there is nothing to prevent his recovery in the state court except the workman's compensation act, which is inapplicable to his case in view of our decisions, the judgment of the Supreme Court of Louisiana must be reversed and the case remanded for further proceedings not inconsistent with this opinion.

The principles applicable to Messel's recovery, should he have one, must be limited to those which the admiralty law of the United States prescribes, including the applicable section of the Federal Employers Liability Act, incorporated in the maritime law by sec. 33, c. 250, 41 Stat. 988, 1007. *Robins Dry Dock & Repair Company* v. *Dahl*, 266 U. S. 438, 449; *Great Lakes Dredge & Dock Co.* v. *Kierefewski*, 261 U. S. 479, 480; *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149; *The Osceola*, 189 U. S. 158; *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375; *Baltimore S.S. Co.* v. *Phillips*, decided May 16, 1927; *Engel* v. *Davenport*, 271 U. S. 33; *Panama R. R. Co.* v. *Vasquez*, 271 U. S. 557.

Judgment reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.